A

MALAYSIA BUILDING SOCIETY BHD

v.

PRIMA FIRST DEVELOPMENT SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
LINTON ALBERT JCA
ANANTHAM KASINATHER JCA
C [CIVIL APPEALS NO: W-02-2197-2010 &
B-02-2622-2009]
16 NOVEMBER 2012

D ***CONTRACT:*** *Sale and purchase of land - Termination - Whether appellant entitled to terminate sale agreement - Whether appellant by its conduct had waived stipulation making time essence of agreement - Whether respondent was ready and willing to discharge its payment obligations*

E ***CONTRACT:*** *Specific performance - Equitable remedy - Respondent granted specific performance of sale agreement - Whether trial judge erred in ordering specific performance - Whether trial judge applied principles of law applicable to exercise of equitable jurisdiction*

F The appellant entered into a sale and purchase agreement ('SPA') with the respondent to sell three parcels of land situated in Selangor ('the lands'). It was a term of the agreement that within one month of the fulfillment of the conditions precedent, the respondent would pay the balance of the purchase price in the form of a banker's guarantee addressed to the appellant. As the G conditions precedent were fulfilled around 26 June 2005, the respondent was required to deposit the banker's guarantee with the appellant's solicitors before 26 July 2005 or 26 August 2005. However, the respondent requested an extension of time until 31 May 2006 to provide the banker's guarantee and the appellant H had granted the said extension subject to a consideration sum of RM50,000. However, as at 13 July 2006, the respondent was unable to produce the banker's guarantee. Instead, it appealed to the appellant to extend the deadline and proposed that the SPA be substituted by two separate and distinct transactions with I entirely new terms and conditions, namely that the banker's guarantee would be furnished by an unnamed nominee of the

respondent. The appellant rejected the respondent's proposed restructured agreement and submitted its own terms for the variation of the agreement. The respondent failed to respond within the stipulated 14 days but sought more time. On 7 November 2006, the appellant terminated the SPA citing the lapse of almost one and a half years since the date of the SPA and the respondent's failure to accept the varied terms within the stipulated 14 days as grounds for the termination. The appellant also required the respondent to withdraw the private caveat it had lodged against the lands. The respondent disputed the appellant's right to terminate the SPA and commenced an action against the appellant for wrongful termination of the SPA. The respondent submitted that the notice of termination was bad in law because it did not provide reasonable notice. It was the respondent's contention that the appellant had, by its conduct, waived the stipulation, making time the essence of the SPA. Based on the facts, the High Court Judge opined that the four preliminary questions framed by the court, to be determined pursuant to O. 14A of the Rules of the High Court 1980, were to be answered in favour of the respondent. This was the appellant's appeal against that decision.

Held (allowing appeal with costs)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The trial judge had erred in finding that the appellant, by its conduct, had waived the stipulation, making time the essence of the SPA. By mutual agreement and for good consideration, the parties had extended the date for the respondent to provide the banker's guarantee to be extended to 31 May 2006. The contents of the correspondence exchanged between the parties after 31 May 2006 was in contemplation of the parties concluding an entirely new agreement and not in execution of the SPA. As such, the appellant had not waived the time for completion so as to render time to be at large. (paras 9 & 18)

(2) There was no change caused by the acts of the parties in the execution of the SPA because the respondent had never fulfilled any part of the payment obligations by way of part performance of the SPA in the period following the original

completion date, *ie*, 31 May 2006. It was evident that the principal obligation of the respondent under the SPA was to produce a banker's guarantee but throughout the period of the negotiations, the respondent failed to make any progress in obtaining the guarantee. Further, in its letter dated 31 May 2006, the respondent displayed a total lack of interest in performing the SPA. As such it was no longer open to the respondent to claim that but for the actions of the appellant it would have been ready and willing to discharge its payment obligations. (paras 13, 15 & 17)

(3) There was overwhelming evidence that the respondent of its own accord abandoned the benefit of the SPA in favour of an entirely new agreement. The negotiations between the parties in the period from 13 July 2006 until the issuance of the letter of termination of 7 November 2006 centred around the parties concluding an entirely new SPA with part of the purchase consideration being financed by the appellant. In these circumstances, the respondent's claim that it was ready and willing to perform the SPA was a bald assertion that did not meet the minimum proof required in law for a court of equity to order specific performance. The trial judge, in ordering specific performance, had not applied the principles of law applicable to the exercise of the equitable jurisdiction of the court when ordering such relief. (paras 16 & 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memeterai satu perjanjian jual beli dengan responden ('PJB') untuk menjual tiga bidang tanah di Selangor ('tanah'). Adalah menjadi syarat perjanjian bahawa dalam masa sebulan setelah syarat duluan dipenuhi, responden akan membayar baki harga dalam bentuk jaminan bank atas nama perayu. Memandangkan syarat duluan telah dipenuhi sekitar 26 Jun 2005, maka responden dikehendaki mendepositkan jaminan bank dengan peguamcara perayu pada 26 Julai 2005 atau 26 Ogos 2005. Responden bagaimanapun meminta lanjutan masa sehingga 31 Mei 2006 untuk mengemukakan jaminan bank dan perayu bersetuju atas balasan sebanyak RM50,000. Bagaimanapun, sehingga 13 Julai 2006, responden masih gagal mengemukakan jaminan bank. Sebaliknya, responden merayu kepada perayu untuk melanjutkan lagi masa dan mencadangkan supaya PJB diganti dengan dua transaksi berasingan dengan terma dan syarat-syarat baharu, iaitu bahawa jaminan bank akan diberi oleh seorang nomini responden yang tidak disebut

namanya. Perayu menolak perjanjian yang dirangka semula yang telah dicadangkan oleh responden tersebut, dan mengemukakan terma mereka sendiri bagi mengubah perjanjian. Responden masih gagal bertindak dalam tempoh 14 hari yang diberikan dan memohon lanjutan masa seterusnya. Pada 7 November 2006, perayu menamatkan PJB atas alasan bahawa satu setengah tahun telah berlalu dari tarikh perjanjian dan kegagalan responden untuk menerima terma yang dipinda dalam tempoh 14 hari yang ditetapkan. Perayu juga menuntut supaya responden mengeluarkan kaveat yang dimasukkannya terhadap tanah. Responden mempertikaikan hak perayu menamatkan PJB dan memulakan tindakan terhadap perayu kerana penamatan salah PJB. Responden berkata bahawa notis penamatan tidak sah di sisi undang-undang kerana tidak memberi notis yang munasabah. Responden menghujah bahawa melalui tindakannya perayu telah menggugurkan peruntukan yang menjadikan masa intipati PJB. Berdasarkan kepada fakta, Hakim Mahkamah Tinggi memutuskan bahawa empat soalan awalan yang dirangka oleh mahkamah, untuk diputuskan di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980, harus dijawab dengan berpihak kepada responden. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Anantham Kasinather JCA menyampaikan penghakiman mahkamah:

(1) Hakim bicara khilaf apabila mendapati perayu melalui tindakannya telah mengetepikan peruntukan yang menjadikan masa intipati PJB. Melalui perjanjian bersama dan atas balasan baik, pihak-pihak telah melanjutkan tarikh untuk responden mengemukakan jaminan bank hingga ke 31 Mei 2006. Kandungan surat menyurat di antara pihak-pihak selepas 31 Mei 2006 adalah atas jangkaan bahawa mereka akan memeterai satu perjanjian baharu dan bukannya untuk melaksanakan PJB. Oleh itu, perayu tidak mengetepikan masa untuk penyempurnaan atau menjadikannya tidak penting.

(2) Tidak ada perubahan berlaku akibat dari perbuatan pihak-pihak dalam melaksanakan PJB, kerana responden tidak pernah memenuhi apa-apa bahagian dari obligasi untuk membayar melalui pelaksanaan sebahagian PJB dalam tempoh selepas tarikh penyempurnaan asal 31 Mei 2006. Adalah jelas bahawa obligasi utama responden di bawah PJB adalah untuk mengemukakan jaminan bank tetapi di sepanjang masa

perbincangan, responden gagal membuat sebarang progres untuk mendapatkan jaminan. Selain itu, dalam suratnya bertarikh 31 Mei 2006, responden tidak menunjukkan langsung minat untuk melaksanakan PJB tersebut. Oleh itu, responden tidak boleh lagi mendakwa bahawa jika bukan kerana tindakan perayu ia sentiasa bersedia untuk memenuhi obligasinya untuk membayar.

(3) Terdapat keterangan kukuh bahawa responden, atas kehendaknya sendiri, telah menolak manfaat PJB bagi menggantikannya dengan perjanjian baharu. Perbincangan di antara pihak-pihak dalam tempoh selepas 13 Julai 2006 sehingga surat penamatan dikeluarkan pada 7 November 2006 adalah berkisar sekitar pihak-pihak memeterai satu perjanjian baharu dengan sebahagian dari pembelian dibiayai oleh perayu. Dalam keadaan sedemikian, tuntutan responden bahawa ia bersedia untuk melaksanakan PJB hanyalah satu tuntutan kosong yang tidak memenuhi bukti minima yang diperlukan di sisi undang-undang bagi membolehkan mahkamah ekuiti memerintahkan pelaksanaan spesifik. Hakim bicara dalam memerintah pelaksanaan spesifik, gagal mengguna pakai prinsip undang-undang yang terpakai kepada pelaksanaan bidang kuasa ekuiti mahkamah apabila memerintahkan relif sedemikian.

Case(s) referred to:

Mehmet v. Benson [1965] 113 CLR 295 ***(refd)***

Quah Ban Poh v. Dragon Garden Pte Ltd [1985] 2 CLJ 75; [1985] CLJ Rep 720 HC ***(dist)***

Wong Kup Sing v. Jeram Rubber Estate Limited [1969] 1 LNS 201 HC ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 14A

(Civil Appeal No: W-02-2197-2010)

For the appellant - Tommy Thomas (Shaikh Abdul Saleem & Hafiza Johari with him); M/s Shaikh David Raj

For the respondent - Cecil Abraham (HY Chong & Francesca Phillip with him); M/s Azman Davidson

(Civil Appeal No: B-02-2622-2007)

For the appellant - Cecil Abraham (HY Chong & Francesca Phillip with him); M/s Azman Davidson

For the respondent - Tommy Thomas (Shaikh Abdul Saleem & Hafiza Johari with him); M/s Shaikh David Raj

Reported by Vani Krishnan

JUDGMENT

Anantham Kasinather JCA:

[1] By consent of parties, Appeal No. W-02-2197-2011 was heard first. In this judgment, the word 'appellant' refers to Malaysia Buildings Society Bhd (the defendant in Kuala Lumpur High Court Civil Suit No. 55-795-2007 and the plaintiff in Shah Alam High Court Originating Summons No. MT 3-24-295-2007) whilst the word 'respondent' refers to Prima First Development Sdn Bhd (the plaintiff in the abovenamed civil suit and defendant in the abovenamed originating summons).

Background Facts

[2] By a sale and purchase agreement dated 8 April 2005 (hereinafter referred to as 'the sale agreement'), the appellant agreed to sell to the respondent three parcels of land held under H.S (D) 93832, P.T No. 27758, H.S (d) 93833, P.T 27759 and H.S (D) 95375, P.T 29301, all in Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor Darul Ehsan (hereinafter referred to 'the said lands') on terms as stated in the sale agreement. The sale of the said lands was subject to several conditions precedent and the time for payment of the purchase price was agreed to be within three months of the date of the sale agreement or one month of the fulfillment of the conditions precedent, whichever is later. The terms of the sale agreement provided for the payment of the balance purchase price to take the form of a letter of guarantee issued by a bank addressed to the appellant for the unconditional payment by the bank to the appellant of the balance purchase price on the expiry of four years from the date of the sale agreement. The banker's guarantee was to be deposited with the firm of solicitors to be appointed by the parties. It is not in dispute that the conditions precedent were fulfilled on or around 26 June 2005 thereby resulting in the respondent being required to deposit the banker's guarantee on or before 26 July 2005 or by the extended completion date of 26 August 2005.

[3] By the letter dated 22 February 2006, the respondent requested from the appellant an extension of time until 31 May 2006 to provide the banker's guarantee. It is not in dispute that by a letter dated 3 March 2006 the appellant granted the extension subject to the payment of the sum of RM50,000 as consideration for this extension and the extension being treated as the final extension. The respondent having failed to deposit the

banker's guarantee by the final extended date of 31 May 2006, in lieu thereof, *vide* its letter of 13 July 2006 proposed a variation of the terms of the sale agreement. This letter seeking the variation included a cheque for RM20,000 as consideration for the appellant:

> allowing us to extend the deadline and to vary the terms of the purchase of the above 3 properties into two separate and distinct transactions
> (see p. 196 of Part 3 Vol. 3 of AR)

The appellant in response thereto *vide* its letters of 26 July and 9 August 2006 expressly acknowledged the receipt of the sum of RM20,000 as being consideration for the extension of time to complete the sale agreement until 31 May 2006 only. The appellant by yet another letter of 9 August 2006, responded to the respondent's variation proposals by making a counter offer which was to operate as a variation to the terms of the sale agreement. The appellant in this letter made it clear that unless the counter offer was accepted within 14 days, the counter offer would lapse and the appellant would terminate the sale agreement.

[4] On 6 September 2006, the respondent put forward to the appellant a new proposal whereby the terms of the sale agreement were to be restructured in such a manner as to cause the three properties forming the subject matter of the sale agreement to be split into two separate agreements with the purchase price also being divided into what the respondent described as the first, second and third property. Under the proposed restructured agreement, two of the three pieces of the said lands were to be purchased by the respondent's nominee company Prima Grand Development Sdn Bhd. The respondent enclosed a cheque for RM1.8 million pursuant to the terms of the newly proposed restructured agreement made out in favour of the appellant together with this letter. The appellant rejected the offer contained in the respondent's letter of 6 September 2006 and by its letter of 27 September 2006 returned the respondent's cheque for RM1.8 million. The appellant instead *vide* another letter of 27 September 2006 submitted its own terms for the variation of the terms of the sale agreement. The appellant required the respondent to accept the terms contained in its letter of 27 September 2006 within 14 days of the date of the said letter and intimated its intention to terminate the sale agreement without

reference to the respondent in default thereof. The respondent failed to respond within 14 days but by its letter of 31 October 2006 sought more time to revert to the appellant's offer citing the need to review the terms and conditions as its basis for this request. The appellant finally by its letter of 7 November 2006 citing the lapse of almost one and half years since the date of the sale agreement and the respondent's failure to accept the offer within 14 days from 27 September 2006 terminated the sale agreement and required the respondent to withdraw the private caveat lodged by it pursuant to cl. 8.1 of the sale agreement and, additionally, revoked the power of attorney granted by it.

[5] The respondent's solicitors by their letter of 15 January 2007 disputed the right of the appellant to terminate the sale agreement. By reason of the matters stated above, the respondent contended that the time for completion of the sale agreement ceased to be of the essence of the sale agreement. The respondent also contended that once time ceased to be of the essence of the sale agreement, the appellant was obliged in law to give reasonable notice before terminating the sale agreement. To the extent that the appellant's letter of termination of 7 November 2006 did not provide for such reasonable notice, the respondent contended that the notice of termination was bad in law.

Issues

[6] Based on the above facts, Her Ladyship opined that the following preliminary questions of law had to be determined pursuant to O. 14A of the Rules of the High Court 1980.

(i) Did the appellant, by its conduct, as revealed in its letters to the respondent, waive the stipulation making time of the essence of the sale agreement;

(ii) If the answer to question (i) above, is in the affirmative, was the appellant required to give notice fixing a reasonable time within which the respondent was to complete the sale agreement pursuant to the terms of the sale agreement;

(iii) If the answer to question (ii) above, is in the affirmative, did the appellant give such a notice in accordance with the terms of the sale agreement; and

(iv) If the answer to question (iii) above, is in the negative, was the appellant entitled to terminate the sale agreement as it purported to do *vide* its letter of 7 November 2006.

Judgment Of The High Court

[7] After tracing the exchange of correspondence between the parties commencing February 2006 till the letter of termination in November 2006, Her Ladyship concluded that the conduct of the appellant in entering and continuing with negotiations after 31 May 2006 caused time to be at large. In Her Ladyship's opinion, such conduct on the part of the appellant induced the respondent into believing that the appellant would not enforce strictly the terms of the sale agreement.

[8] Her Ladyship citing the following passage in the judgment of Gunn Chit Tuan J:

> ... the effect of waiver of time being the essence of the agreement was that time became at large. Therefore if the defendant had wanted to make time again of the essence of the contract, it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last installment; and what is a reasonable time is a question of fact to be decided on the circumstances of each case

opined that it was necessary for the appellant to have given reasonable notice before terminating the sale agreement. Since the appellant's letter of termination of 7 November 2006 was not preceded by any letter from the appellant providing the respondent with the reasonable time to pay the balance of the purchase price, Her Ladyship answered the third issue in the negative and consequently held the termination notice to be bad in law in answer to the fourth issue.

[9] In recognition of the fact that the remedy of specific performance required the exercise of Her Ladyship's discretion and bearing in mind that a prerequisite to the exercise of this discretion was whether the respondent was ready and willing to complete the purchase, Her Ladyship then examined the affidavit affirmed by the respondent to ascertain its readiness to complete the purchase. Her Ladyship accepted at face value the claim of the respondent in its affidavit that it was ready and willing to complete the sale agreement and accordingly granted specific performance of the sale agreement in favour of the respondent.

Judgment Of The Court

[10] We do not propose in this short judgment to dwell on whether Her Ladyship had properly answered the four issues framed by the court. In our judgment, for reasons which will become evident hereinafter, the learned trial judge should have answered the first question in the negative and on that ground alone dismissed the respondent's claim. In any event, over and above the four questions the respondent still had to prove an essential ingredient to be granted the equitable remedy of specific performance. This essential ingredient was the need for the respondent to prove that at the date of the filing of the writ and on the date of the hearing of the claim, it was ready and willing to perform its obligations under the sale agreement. With respect, Her Ladyship whilst relying on that part of the judgment of His Lordship Raja Azlan Shah J (now His Highness Sultan of Perak) and Gunn Chit Tuan J (as His Lordship then was) in the cases of *Wong Kup Sing v. Jeram Rubber Estate Limited* [1969] 1 LNS 201; [1969] 1 MLJ 245 and *Quah Ban Poh v. Dragon Garden Pte Ltd* [1985] 2 CLJ 75; [1985] CLJ (Rep) 720; [1985] 2 MLJ 159 respectively, on the law applicable as to when time ceased to be of the essence of a contract, failed to refer to the equally relevant pronouncements in these two judgments on what amounts to sufficient proof that a purchaser was ready and willing to perform the contract.

[11] In the case of *Wong Kup Sing v. Jeram Rubber Estate Limited (supra),* His Lordship Raja Azlan Shah J described the nature of the evidence which the respondent purchaser would have to adduce to satisfy this requirement to be:

> Another factor in his favour is that he has averred and proved a continuous readiness and willingness to perform the contract from the date of the contract to the time of hearing (*Ardeshir v. Flora Sasson*). This is confirmed by the negotiations between the parties down to and including 30 December 1967. Mr. Sault from the Bar did say on the date of hearing that his client was ever ready, and willing to deposit the balance of the purchase money into Court on any day specified. In my view, this further confirms the plaintiff's continuous readiness and willingness to perform the contract.

[12] In the case of *Quah Ban Poh v. Dragon Garden Pte Ltd (supra)*, Gunn Chit Tuan J cited with approval a passage in the judgment of Barwick CJ in the Australian High Court case of *Mehmet v. Benson* [1965] 113 CLR 295 which dealt with the same subject in this manner:

> The question as to whether or not the plaintiff is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contracted and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price; and, unless time be and remain of the essence, he obtained what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt. To order specific performance in this case would not involve the Court in dispensing with anything for which the vendor essentially contracted. Of course, the plaintiff must not by his unreadiness or unwillingness to perform have disowned his obligation to do so, or abandoned his rights to the benefit of the contract. But it is the essential terms of the contract which he must be ready and willing to perform. He seeks a transfer of the interest in land, the subject of the contract: the counterpart obligation is the payment of the price. In considering the question of the plaintiff's readiness and willingness in this respect in this case there are many factors. His default in paying the installments of the price, whilst not conclusive, is amongst these factors ...

[13] A close examination of the facts of the case of *Wong Kup Sing v. Jeram Rubber Estate Limited (supra)* will reveal that the purchaser had for each of the six extensions paid substantial sums by way of consideration and had paid three of the four installments in satisfaction of the balance purchase price. In other words, on the facts of the case of *Wong Kup Sing v. Jeram Rubber Estate Limited (supra)*, the purchaser had substantially performed the contract causing the learned trial judge to comment:

> It must be remembered that the ground upon which a Court of equity enforces specific performance of a contract affecting land is that it acts upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract and not upon the contract itself.

By reason of the consideration paid for the six extensions and the satisfaction of three of the four installments, His Lordship concluded that:

> It would therefore be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce his strict legal rights against the plaintiff which he had been led to believe would not be enforced against him.

Similarly, in the case of *Quah Ban Poh v. Dragon Garden Pte Ltd (supra)*, the purchaser had in fact paid the last installment "under protest" because of a dispute over whether the construction works had been satisfactorily completed, only for the vendor to return the cheque. Accordingly, Gunn Chit Tuan J had little difficulty in finding that the buyer was ready and willing to pay the balance purchase price.

[14] We now propose to examine 'the changed position caused by the acts of the parties done in execution' of the sale agreement, if any, in this case. In our judgment, no change at all took place in the execution of the sale agreement. We opine to this effect because the respondent never fulfilled any part of the payment obligations by way of part performance of the sale agreement in the period following the original completion date. The only change concerned negotiations over the terms and conditions of the sale agreement itself. During this period, the respondent initiated negotiations to substitute the sale agreement with two new agreements. By a letter dated 22 February 2006, the respondent intimated to the appellant that it had received an "indicative offer" from Bank Muamalat agreeing to issue a banker's guarantee and consequently requested for an extension of time until 31 May 2006 to discharge its obligation to deposit the banker's guarantee. This request was granted by the appellant subject to the payment of RM50,000 as consideration for the same. 31 May 2006 came and went without any positive action on the part of the respondent. Indeed, the documentary evidence reveals that the respondent ceased thereafter to make any reference to Bank Muamalat. Instead on 13 July 2006, the respondent forwarded the cheque for RM20,000 (not the agreed RM50,000), appealed to the appellant to extend the deadline and proposed that the sale agreement be substituted by 'two separate and distinct transactions' with entirely new terms and conditions. More importantly, the respondent's proposal contemplated part of the purchase price to be financed by the appellant itself.

[15] It is not in dispute that the negotiations between the parties in the period from 13 July 2006 until the issuance of the letter of termination of 7 November 2006 centered around the parties concluding an entirely new sale and purchase agreement with part of the purchase consideration being financed by the appellant. Although the counter proposals of the appellant stipulated for the banker's guarantee to be furnished by Bank Muamalat, there is no evidence that the respondent was in communication with Bank Muamalat after 31 May 2006. On the contrary, the respondent's proposals contained in their letter of 13 July 2006 contemplated the banker's guarantee being furnished by an unnamed nominee of the respondent. That the respondent was not in a position to produce a banker's guarantee from Bank Muamalat is evident from its failure to respond in a timely manner to the appellant's counter offer contained in its letter of 27 September 2006 requiring the banker's guarantee of Bank Muamalat. The respondent instead *vide* its letter of 27 September 2006 sought a further extension of time.

[16] In our judgment, the question of law that arises for the consideration of this court based on the aforesaid facts, is whether 'the acts of the parties' (to use the words of His Lordship Raja Azlan J in the case of *Wong Kup Sing v. Jeram Rubber Estate Limited*) were done in execution of the contract so as to render it inequitable for this court to not order the specific performance of the sale agreement. A corollary question of law based on the facts set out in paras. 13 and 14 above, are whether the acts of the respondent amount to an abandonment of the sale agreement. According to the judgment of the court in *Quah Ban Poh v. Dragon Garden Pte Ltd (supra)*, the pronouncements of Barwick CJ in *Mehmet and Benson (supra)* should be applied to determine these questions of law. Based on the pronouncements of Barwick CJ, more particularly set out in para. 11 of this judgment, it is evident that once it is acknowledged that the principal obligation of the respondent under the sale agreement was to produce a banker's guarantee and the respondent failed to make any progress in obtaining the guarantee throughout the period of the negotiations, then, it is no longer open to the respondent to claim that but for the actions of the appellant, it would have been ready and willing to discharge its payment obligations. By the same token, since the respondent had not made any progress in securing the banker's guarantee during the period of the negotiations, there is no

justification for the learned trial judge to have considered it inequitable to not order specific performance in favour of the respondent due to the change of circumstances created by the actions of the appellant.

[17] Finally, there is overwhelming evidence that the respondent of its own accord abandoned the benefit of the sale agreement in favour of an entirely new agreement. We opine to this effect for the following reasons:

a) First, under the sale agreement, the respondent was required to deposit a banker's guarantee with a solicitor agreed upon by both parties. Based on the documentary evidence, the only bank which had favourably considered the application of the respondent to provide a banker's guarantee was Bank Muamalat. However, it is evident from the contents of the unsigned letter of 17 February 2008 from Bank Muamalat that the bank had not made a firm offer to provide the banker's guarantee. This is evident from the representation in the letter that the contents of the same "should not be considered as a commitment at this stage as it is intended for discussion purpose only". By its letter of 22 February 2006, the respondent expressed confidence that it would be able to produce the Banker's Guarantee of Bank Muamalat by 31 May 2006, hence, the request for the extension of time till 31 May 2006. This never materialised. What is significant is that in its letter of 13 July 2006, the respondent no longer claimed to be capable of producing a bank guarantee from Bank Muamalat. Instead in para 1(b) of its letter of 13 July 2006, the respondent stated that it expects its nominee to provide the bank guarantee for RM14 million with a further RM14 million to be financed by the appellant. In our judgment, the contents of the respondent's letter of 13 July 2006 by providing for a totally new arrangement for the discharge of its primary obligation under the sale agreement ie, the payment of the purchase price, effectively abandoned the benefit of the sale agreement in favour of a new agreement;

b) Secondly, the respondent's readiness to discharge the payment obligations based on the contents of its letter of 13 July 2006 clearly rested fairly and squarely on the appellant part financing the purchase consideration. In other words, 'the acts of the parties' between 31 May 2006 and the termination of

A the agreement in November 2006 reflects a position whereby the respondent acknowledged that it was incapable of completing the sale agreement without the assistance of the appellant and which assistance the appellant was not obliged to provide under the sale agreement and had not undertaken
B to provide during the negotiations save on terms peculiar to a new sale agreement. In these circumstances, in our judgment, the claim of the respondent that it was ready and willing to perform the sale agreement is nothing but a bald assertion which does not meet the minimum proof required in law for a
C court of equity to order specific performance; and

c) Finally, the equity unlike in the cases of *Wong Kup Sing v. Jeram Rubber Estate Limited (supra)* and *Quah Ban Poh v. Dragon Garden Pte Ltd (supra)*, does not favour the
D respondent. This is because unlike in the cases of *Wong Kup Sing v. Jeram Rubber Estate Limited (supra)* and *Quah Ban Poh v. Dragon Garden Pte Ltd (supra)*, the respondent on the facts of this case has not paid any part of the purchase price and more than a year and half has lapsed since the date of the
E execution of the sale agreement. Indeed, the respondent had not even paid the customary 10% deposit payable in the case of a typical sale and purchase agreement for the purchase of land. In these circumstances, the equities clearly favour the appellant rather than the respondent.

F **[18]** It was urged upon us by counsel for the respondent that as an appellate court we should not lightly disregard the findings of fact of the learned trial judge that the respondent was ready and willing to discharge its contractual obligations. With respect, it is
G trite law that an appellate court can set aside findings of facts of a trial judge particularly if made on affidavit evidence. In this case the learned trial judge in ordering specific performance did not apply the principles of law applicable to the exercise of the equitable jurisdiction of the court when ordering such relief. As
H opined by Raja Azlan J in *Wong Kup Sing v. Jeram Rubber Estate Limited (supra)*, the burden on the respondent when seeking such relief is not only to plead that it was ready and willing but also to prove, this to be the case. On the facts of this case, it is evident that the learned trial judge accepted the bald assertion of the

I

respondent that it was ready and willing when, with respect, all the documentary evidence did not reflect this to be the case. With utmost respect to the learned trial judge, in a claim of this nature, the learned trial judge should have examined the law and analysed the facts to ascertain whether the respondent had discharged the burden of proving that it was indeed ready and willing to perform its payment obligations to the extent required by the law, before exercising Her Ladyship's equitable jurisdiction. In this respect, in our judgment, Her Ladyship erred in disregarding the contents of the letters originating from the respondent after 31 May 2006 wherein the respondent displayed a total lack of interest in performing the sale agreement which, to use the words of Barwick CJ amounted to the respondent:

> by his unreadiness or unwillingness to perform have disowned his obligation to do so or abandoned his rights to the benefit of the contract.

[19] Reverting now to the first question framed by the parties and resolved by the learned trial judge in favour of the respondent, with respect, we beg to differ with the opinion of the learned trial judge that the appellant by its conduct waived the stipulation making time of the essence of the sale agreement. The fact of the matter is that by mutual agreement and for good consideration, the parties agreed to vary the terms of the sale agreement for the date for the provision of the banker's guarantee to be extended to 31 May 2006. Thereafter, the appellant repeatedly in all of its correspondence reiterated that the respondent was to treat 31 May 2006 as the last date for it to fulfil the terms of the sale agreement. The contents of the correspondence exchanged between the parties after that date was in contemplation of the parties concluding an entirely new agreement and consequently not in execution of the sale agreement. In these circumstances, with respect, we are unable to agree with the learned trial judge that the appellant had waived the time for completion so as to render time to be at large.

[20] Accordingly, we allowed this appeal with costs. The decision of High Court Judge is hereby set aside and the respondent to pay RM75,000 as costs here and below to the appellant. Deposit refunded to the appellant.

[21] Civil Appeal No. B-02-2622-2009 concerns an appeal lodged by the respondent in Civil Appeal No. W-02-2197-2010 arising from the setting aside by the High Court of the caveat lodged by the respondent in Civil Appeal No. W-02-2197-2010. Arising from our decision disallowing the respondent's claim for specific performance of the sale agreement, it follows as a matter of course that the respondent no longer has any right to retain the caveat over the property forming the subject matter of Civil Appeal No. W-02-2197-2010. Accordingly, learned counsel for the respondent offered no submission in respect of Civil Appeal No. B-02-2622-2009 which is hereby dismissed. Accordingly, the appellant in Civil Appeal No. B-02-2622-2009 is hereby ordered to pay costs of RM30,000 to the respondent as costs here and below. Deposit is hereby ordered to be paid to the respondent towards account of such costs.